footing with its competitors relative to the offering and provisioning of basic and enhanced services.[66]

VI. BOC AFFILIATES SHOULD BE CLASSIFIED AND REGULATED AS NON-DOMINANT LONG DISTANCE CARRIERS (NPRM ¶¶ 108-152)

A critical question at issue herein is whether the Commission should classify the Section 272 BOC affiliate(s), as well as other LEC-affiliated providers, as "dominant" or "non-dominant" providers of in-region domestic and international long distance services. The Commission appears ready to determine that the affiliates should be classified and regulated as non-dominant carriers. This is the correct conclusion.

The Commission begins by noting the stringent and burdensome requirements of dominant carrier regulation, and that all other domestic interexchange carriers ("IXCs") have been found to be non-dominant -- including AT&T, MCI and SPRINT, the market leaders. It further observes that it has long since held in the Competitive Carrier proceeding that the provision of long distance services by LEC-affiliates other than the BOCs should be treated as non-dominant providers (NPRM ¶ 111). Applying the same analyses and criteria now, these BOC affiliates are clearly non-dominant carriers.

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[66] In its February 1995 Interexchange Reconsideration Order (10 FCC Rcd 4580) the FCC noted that the CI-II rules required that all carriers must unbundle their basic and enhanced services and acquire transmission capacity pursuant to the same prices, terms, and conditions and must offer transmission capacity to other enhanced services providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service.

The issue of dominant or non-dominant treatment depends upon whether the carrier at issue can exercise market power. That is, whether the carrier is able: (1) "to raise prices by restricting its own output" or (2) "to raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, that its rivals need to offer their services" (NPRM ¶131). The NPRM sets forth no basis for concluding that the BOC-affiliates could exercise market power in either of these ways. In fact, they cannot.

A. The Relevant Market For The Determination Of The Affiliate's Market Power Is Nationwide Domestic Interexchange Service (NPRM ¶¶ 115-129)

The NPRM "market power" analysis begins with establishing the relevant product and geographic markets. With regard to the relevant markets, the Commission should adhere to the product and geographic market definitions it adopted for interexchange services in the Competitive Carrier proceeding, and to which no serious challenge has been raised in any subsequent proceeding.

In the Competitive Carrier proceeding, giving weight to the Department of Justice/Federal Trade Commission 1992 Merger Guidelines ("Merger Guidelines") consideration of demand substitution, the Commission defined the relevant product market for determining market power of domestic IXCs as being comprised of all interstate, [domestic] interexchange telecommunications services. The Comments and Replies in the recent Interexchange NPRM continue to support this as the relevant

product market definition.[67] In light of the fact that no "credible evidence" exists that there is a particular service or group of services that will be offered by BOC affiliates with respect to which there is or could be lack of competitive performance, the Commission should retain the Competitive Carrier product market definition for its analysis of BOC affiliate market power in the provision of interexchange telecommunications services.

Similarly, the Commission should continue to define the relevant geographic market as a single, nationwide market. The analysis utilized in the Merger Guidelines supports a nationwide market with regard to interexchange telecommunications services provided by BOC affiliates, regardless of whether such services originate in-region or out-of-region. Demand substitution supports this definition because customers demand that carriers provide "ubiquitous calling" which allows the placement of calls to anywhere in the country. Quite unlike the situation with airline carriers, in which customers choose a specific carrier at a specific time because that carrier has flights between particular destinations, telecommunications customers choose an IXC for its ability to complete calls to any location of the customer's choosing. That is, customers subscribe to IXCs who are capable of providing them with ubiquitous calling, they do not choose

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[67] See, Interexchange NPRM, NYNEX Comments, filed April 19, 1996 (at pp. 4-8), and NYNEX Reply Comments, filed May 3, 1996 (at pp. 3-6); see, also AT&T Comments at p. 4 ("[t]he Commission's proposals to revise the established interexchange market definitions, however, should not be adopted. The proposed revisions. . . [are] contrary to settled principles of both law and economics.").

interexchange carriers on a per-call basis. Consistent with customer demand, Congress imposed the competitive checklist requirements under the 1996 Act only on the "originating" end of most interexchange calls, without regard to where a call terminates. Furthermore, in terms of supply substitution, the major facilities-based IXCs have national networks with alternative routing capabilities, and additional IXCs capable of providing ubiquitous calling can and do enter either through the construction of new facilities or by reselling the services of other carriers.

As discussed in NYNEX's Comments on the Interexchange NPRM with regard to BOCs[68], even if a BOC affiliates' interexchange customers are concentrated in-region, there is nothing that is unique about a BOC affiliate in this respect that would favor changing the definition of the relevant geographic market. Geographic rate averaging will affect a BOC affiliate in the same way it effects other IXCs who offer services that are concentrated in a particular region or state. Furthermore, sufficient safeguards exist with regard to a BOC's control of access facilities under current Commission rules and the 1996 Act such that a BOC affiliate could not exercise market power in the interexchange market by virtue of the market power that the BOC might have in the access market.[69] Therefore, no examination of a point-to-point market is either necessary or appropriate with regard to calls which originate in-region. The same nationwide geographic market as is used for examining the market power of other interexchange

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[68] Interexchange NPRM, NYNEX Comments, at p. 6

[69] Id. at 7.

carriers should be used for an examination of the market power of a BOC affiliate providing interexchange service.

B. The Long Distance Affiliate Does Not Have Domestic Market Power

The Commission uses four criteria to assess carrier domestic market power: the carriers' market share, the supply substitutability of the market, the demand substitutability of the market, and other factors (e.g., the cost structure, size or resources of the entity, as well as its control --if any-- of bottleneck facilities) (NPRM ¶ 133). As it properly observes in the NPRM, these affiliates are patently non-dominant with respect to three of these factors. That is, they have no marketshare, the market has an abundant supply of facilities, and customers have demonstrated that they "are sensitive to price" (Id.). Further, even with respect to other factors, the affiliates as new entrants lack any aspect of size, cost structure or resources that could enable them to exert market power. Indeed, as resellers of other carrier's facilities, they clearly lack the ability to exert market power over long distance services.[70]

The NPRM also seeks comment with respect to several concerns frequently advanced by competitors in opposing the entry of BOC affiliates into the long-distance service market. It starts by inquiring whether the BOC's control of access facilities

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[70] See, Competitive Carrier, Fourth Report and Order, 95 FCC 2d at 577 (1983): "We distinguished resellers [in the Second Report and Order] from other non-dominant carriers in that resellers do not own their facilities; the underlying carriers' rates act as a "just and reasonable" ceiling on resellers' rates, and resellers cannot affect the availability to the public of services via the underlying facilities."

would cause a BOC affiliate to "quickly achieve market power in the provision of in-region, interstate, domestic, interLATA services" (NPRM ¶ 134). There is little basis for this concern. First, as in Competitive Carrier, the long distance services at issue must be provided by a separate affiliate of the BOC, and that affiliate controls no access facilities. Second, the BOC which "controls" those facilities is itself pervasively regulated, and must serve all carriers without discrimination. Third, the BOC's provision of access service is closely scrutinized by interexchange carriers which are sophisticated, demanding customers that monitor the service level(s) they demand of providers.[71] Fourth, all BOCs are themselves heavily dependent upon the revenues received from interexchange carriers for their financial viability. Finally, there are no practical incentives for BOC misconduct without self-destructive results given both the ability of interexchange carriers to use access alternatives under Section 251 of the Act and the severe penalties available to the Commission for dealing with unlawful and anticompetitive conduct upon complaint.

Next, with respect to the spectre of "cost misallocations" (NPRM ¶135), Section 272 (b) (2) requires that the affiliate keep separate books of account and "shall maintain [its] books, records, and accounts in the manner prescribed by Commission," which will make proper cost allocations easy for it to record and for the Commission to

[71] Indeed, it is not unusual for the interexchange carrier to closely track the BOC's performance in a "report card" comparing the service provided to customer-designated service levels, previous period service levels, and the provision of service by comparable entities in the same or similar areas (i.e., CAPs or LECs).

observe. In parallel, Section 272 (c)(2) requires that the BOC "shall account for all transactions" with these affiliates in accordance with Commission accounting instructions. Finally, as the Commission itself has observed, price cap regulation of BOC access services substantially "reduces the potential that the BOCs would improperly allocate the costs of their affiliate's interLATA services."[72] This is especially true for "non-sharing" BOCs like the NYNEX telephone companies. Given all of the above, and the Commission's favorable experience with similar rules in the past (NPRM ¶146), there is no reason to conclude that speculation of cost "mis-allocations" require dominant carrier treatment.

The NPRM also inquires whether the BOC can use its market power in the provision of local exchange and access services to discriminate in favor of its affiliate (NPRM ¶ 139). There is no basis for this concern. On the contrary, the BOCs have exhibited full adherence to balanced, procompetitive conduct in other telecommunications markets; e.g., cellular service. Further, "successful discrimination" would require that the BOCs impair the quality of their competitors' services (or somehow favor their own) in a way that neither the competitors nor regulatory or other legal authorities would detect, but that customers would -- and would conclude that the only remedy lay in subscribing to the affiliates' services. Additionally, its anticompetitive gains would have to exceed its costs and access revenue losses, which would be considerable. Further, it would have to

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[72] NPRM ¶ 136, citing this longstanding holding from the BOC Safeguards Order, 6 FCC Rcd at 7596.

be accomplished in a manner which did not also disrupt the BOC's local services -- which in nearly all cases would be provided on common facilities with the IXC's services. The prospects for such a discriminatory plan to be undertaken, however misguided, or successfully accomplished are negligible.[73]

Finally, the NPRM inquires whether a BOC could use its alleged "market power" to give its affiliate a competitive advantage by raising the price of access to all IXCs carriers, including its affiliate, thus: (a) retaining additional profit (from all IXCs) for itself; and (b) enabling the affiliate to gain market share by absorbing the access cost increase, while other IXCs raise their prices (NPRM ¶ 141). Experience has demonstrated that these fears are unfounded.

First, BOC access services are managed under price cap regulation which generally limits price increases. In fact, experience has shown that the price cap process has actually worked to decrease prices. Thus, there is no real prospect of unrestrained BOC price increases. Second, IXC pricing has not responded to BOC price changes. On the contrary, experience shows that significant access price reductions are not passed

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[73] As was established in The Motion To Vacate proceeding brought before the MFJ court, BOC network technology and support systems would not permit access service discrimination without severe and obvious consequences. Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation and Southwestern Bell Corporation, United States v. Western Electric Co., Inc., CA No. 82-0192 (HHG), filed July 6, 1994. Affidavit of Casmir S. Skrzypczak, dated June 30, 1994, see also, Reply of BellSouth Corporation, NYNEX Corporation and SBC Communications, Inc., United States v. Western Electric Co., Inc., CA No. 82-0192 (HHG), filed June 30, 1995. Affidavit of Casmir S. Skrzypczak, dated June 29, 1995.

through by IXCs .[74] This market failure, caused by tacit price coordination among the few market leaders, necessitates effective BOC affiliate entry to make the market more, rather than less competitive.[75] Third, the access market itself is sufficiently competitive to constrain increases in access prices. For example, NYNEX has shown that access competition requires not only lower prices, but increased pricing flexibility, in order to meet the needs of a very demanding and competitive interexchange marketplace.[76] Finally, the significant changes to the local exchange service and access markets which are initiated and portended in the Interconnection Order make it entirely unreasonable to fear that any BOC access pricing will result in the affiliate's attainment of long distance market power.[77]

C. The Application Of Dominant Carrier Regulation To These Affiliates Would Be Contrary To The Public Interest

The Commission also properly inquires whether any of the dominant carrier regulatory requirements applied to the affiliates "would constrain the ability of the BOCs to engage in improper allocation of costs, discrimination, or other anticompetitive

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[74] See, e.g., Interexchange NPRM, NYNEX Comments at p. 3 ("...AT&T was able to raise its long distance rates in 1995 at the same time that the LECs were implementing a $1.2 billion reduction in their access charges').

[75] See, Interexchange NPRM at ¶ 81 ("we believe that the 1996 Act provides the best solution to any problem of tacit price coordination, to the extent it exists currently, by allowing for competitive entry in the interstate interexchange market by the facilities-based BOCs and others." The Commission must enable such effective competition herein.

[76] See, NYNEX USPP Order, 10 FCC Rcd. 7445 (1995), and Petition to Expand Waiver, filed July 10, 1996.

[77] Indeed, the NPRM itself points to the wholly unlikely prospect of successful BOC predation against such market incumbents as AT&T (NPRM ¶ 137).

conduct to the extent the affiliate would gain market power" (NPRM ¶ 143). As above, there is no prospect for the affiliate to gain market power. Further, it is manifest that dominant carrier regulation of the affiliate is not designed to govern BOC conduct. Whether or not the affiliate must file tariffs on 14-, 45- or 120- days' notice, or file detailed cost support, or be subject to price cap regulation, or obtain specific prior Commission approval under Section 214 of the Act (NPRM ¶ 109), none of these conditions affects the BOC's provision of service. Instead, BOC access services are price cap regulated directly and in detail by the Commission and State regulatory authorities.

In fact, the burdensome conditions of dominant carrier regulation would serve only to impair the ability of the affiliate to compete effectively and efficiently as a new entrant. The Commission recognized in the Competitive Carrier proceeding that subjecting non-dominant carriers to pre-disclosure of their business plans to competitors through prior facility approvals, or by advance tariff and detailed cost requirements, would not serve the public interest. As a consequence, no prior Section 214 approval is required of any non-dominant carriers.[78] Similarly, the Commission found in Competitive Carrier that prior tariff review impedes the public interest in a number of ways, specifically by:

> "(1) taking away carriers' ability to make rapid, efficient responses to changes in demand and cost;

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[78] See, the Commission's finding in Fourth Report and Order, 95 FCC 2d at 580 that:

"Facility decisions by non-dominant carriers cannot be translated into higher prices and cannot make service unavailable. Efficient application of our Section 214 authority does not require circuit-by-circuit analysis of their facilities; in fact, such analysis would be an unnecessary regulatory burden, impair competition, and be contrary to the public interest."

(2) impeding and removing incentives for competitive price discounting;
(3) imposing costs on carriers that attempt to make new offerings; and
(4) increasing the costs of the Commission's operations.

All of these effects can harm consumers through higher prices and services which do not meet their needs."[79]

D. These Affiliates Should Also Be Regarded As Non-Dominant International Carriers (NPRM ¶ 150)

The NPRM also addresses the determination of relevant product and geographic markets for international services, as well as whether the form of regulatory treatment applied to the provision of in-region, international services should be the same as is applied to in-region domestic interLATA services (i.e., dominant/nondominant). With respect to the relevant market, the Commission tentatively concludes that is should consider the affiliate's market power in two product markets, international message telephone service ("IMTS") and non-IMTS (NPRM ¶ 121), as it did in the International Competitive Carrier Order.[80] With respect to the relevant geographic market, the Commission notes that it earlier determined that every destination country constituted a separate geographic market for international service, but tentatively concludes that, "for the purposes of this proceeding we can analyze the market power of BOC affiliates . . . on

[79] Fifth Report and Order, 98 FCC 2d 1191, 1199 n.24 (1984), citing Further Notice of Proposed Rulemaking, 84 FCC 2d 445, 453-55 (1981).

[80] In the Matter of International Competitive Carrier Policies, Report and Order, 102 FCC 2d 813, 821-22 (1985).

a worldwide basis . . . ," except that route-by-route findings are necessary where "the carriers are affiliated with foreign carriers in the destination market." (NPRM ¶ 129).

NYNEX concurs with the Commission's identification of two product markets in international services. We also agree that the Commission should assess BOC market power "on a worldwide basis" and need not generally make route-by-route findings, with the exception of routes in which the carriers are affiliated with foreign carriers in the destination market.[81]

Finally, the NPRM also tentatively concludes that it should afford the same regulatory treatment to the affiliate's in-region international services as it does to in-region, domestic services (NPRM ¶ 150). This tentative conclusion is based on the Commission's view that there are "no practical distinctions" between a BOC's ability to use its market power in either of these two markets. (Id.). While NYNEX concurs with this tentative conclusion,[82] more importantly we strongly urge the Commission to find that the affiliate lacks the ability to exert market power in the in-region international market, as it does for the domestic in-region market.[83]

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81 Id. at 828-829.

82 See, e.g., In the Matter of NYNEX Long Distance Company, et al., Order, Authorization And Certificate, ITC-96-125, DA 96-1169 (released July 24, 1996). ("NYNEX International 214 Order").

83 We recognize the Commission's concerns that where an affiliated foreign carrier may have "the ability to discriminate against unaffiliated U.S. international carriers through the control of bottleneck services and facilities *in the foreign market*," the Commission may properly classify the U.S. carrier as dominant to that destination "based on the foreign carrier affiliation" (NPRM ¶ 151, emphasis supplied). We note that the Commission has recently found that NYNEX does not have any foreign carrier affiliations, with one possible

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The Commission's long-standing pro-competitive policies, as well as the new national telecommunication policy enacted in the 1996 Act, require that the long distance affiliate be classified and regulated as a non-dominant carrier for both domestic and international services.

VII. THE COMMISSION SHOULD ADOPT BALANCED PROCEDURES FOR ENFORCEMENT OF SECTIONS 271 AND 272 (NPRM ¶¶ 94-107)

A. The Statutory Mechanisms Are Sufficient To Facilitate Enforcement of the Separate Affiliate and Nondiscrimination Safeguards of Sections 271 and 272

The Commission questions whether it should impose additional reporting requirements to monitor compliance with Sections 271 and 272, such as Computer III-type reporting requirements, or a third-party compliance monitoring system (NPRM ¶ 95). Congress has already addressed this question, and has specifically described the structural and non-structural safeguards that are required.

Accordingly, the Act already contains effective reporting requirements. Section 272(b)(5) requires that all transactions between a BOC and its separate affiliate be reduced to writing and be made available for public inspection. Section 272(d) requires

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exception, that would cause it to be classified as dominant on any international route. NYNEX International 214 Order. The one possible exception is in Gibraltar, where NYNEX has an interest in Gibraltar NYNEX Communications Limited. The proper treatment of NYNEX in the US-Gibraltar route is now pending before the Commission. NYNEX Long Distance Company Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Provide International Services from Certain

the BOC to conduct an external audit every two years to evaluate the company's compliance with the structural separations rules and with the accounting requirements. The results of the audit must be submitted to the State regulatory authorities and to the Commission, and the audit must be made available for public comment.

Furthermore, the Act requires the BOCs to maintain records that will facilitate enforcement. Section 272(b)(2) requires the BOC separate affiliate to "maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate." Section 272(c)(2) states that a Bell operating company "shall account for all transactions with an [interLATA affiliate] in accordance with accounting principles designated or approved by the Commission."

Given the statutory reporting requirements and the accounting rules, the Commission should not adopt different reporting requirements.[84] Instead, it should define what it expects in the reports that the statute requires.

Points within the U.S. to Gibraltar through the resale of International Switched Services ITC 96-____, filed August 2, 1996.

[84] The Commission should be reluctant to adopt the proposals of competitors for new reports, as these also may serve as a means to burden new entrants and obtain otherwise proprietary, confidential information. See, in this regard, the concerns expressed by both the Commission and the Joint Parties in CC Docket No. 96-55, relating to the disclosure of confidential information to competitors through abuse of the Commission's processes. In the Matter of Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Notice of Inquiry and Notice of Proposed Rulemaking, CC Docket No. 96-55, FCC 96-109, released March 25, 1996; Comments of Joint Parties, filed June 14, 1996, and Reply Comments of Joint Parties, filed July 15, 1996.

B. The Commission Should Reconsider Its Tentative Conclusions With Respect To Section 271 Enforcement Provisions

The Commission requests comments on how it should carry out its authority under Section 271(d)(6)(A) to impose remedies for a BOC's failure to meet any of the conditions imposed on the Commission's approval of the BOC's application for in-region interLATA authority under 271(d)(3) (NPRM ¶ 97). NYNEX believes that most of the Commission's proposals would unduly burden the BOCs and deny them their due process rights. A more balanced approach would provide fairness to both the BOCs and their competitors, while permitting the Commission act within the 90-day deadline established by Section 271(d)(6)(B).

1. Use of Sections 206-209 to Enforce Compliance with Section 271

The Commission tentatively concludes that if a BOC failed to meet the conditions for approval of its application for in-region interLATA authority, the Commission could impose the specific sanctions in Section 271(d)(6)(A) as well as award damages to third parties under Section 209. NYNEX does not agree with this analysis.

Congress enacted Section 271(d)(6)(A) to provide specific remedies for a BOC's failure to continue to meet the conditions imposed on its interLATA authority, which could include issuance of a compliance order, imposition of penalties under Title V, or suspension or revocation of the approval. These specific remedies supercede the general sanctions contained in Sections 206-209 of the Act with regard to such actions by a BOC. This interpretation is consistent with two familiar rules of statutory construction --

that the expression of one thing in the statute excludes the other ("expression unius est exclusio alterius") and that the specific provisions of a statute control the general.[85] If Congress had intended that all of the existing enforcement provisions of the Act would apply to a failure of a BOC to meet the conditions on its Section 271 authorization, there would have been no need to specify that the penalty provisions of Title V would apply. This specific reference should be viewed, together with the other two remedies specified in Section 271(d)(6), as exclusive of any general remedies found elsewhere in the Act, such as the general damages provisions of Sections 206-209.

2. Legal and Evidentiary Standards for Proving Non-Compliance

Apparently concerned about its ability to act on complaints relating to a BOC's alleged failure to meet the conditions for interLATA approval within 90 days, as required by Section 271(d)(6)(B), the Commission proposes: (1) that a complainant could establish a prima facie case by presenting allegations which, if true, would show that the BOC has violated the Act; and (2) that the BOC would have the burden of proof once a complainant has presented such a prima facie showing (NPRM ¶¶ 100-102).

These proposals would constitute a serious denial of due process, and they are in any event unnecessary to carry out the purposes of the Act or to meet the 90-day deadline.

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[85] See National Railroad Passenger Corp. v. National Assoc. of Railroad Passengers, 414 U.S. 453, 458 (1974); In the Matter of Amendment of Part 76 of the Commission's Rules and Regulations to Require Cable Television Carriage of Certain Subscription Television Signals, 77 FCC 2d 523, 527 (1980).

If the Commission is to succeed in acting on complaints within the abbreviated period prescribed by the Act without abridging the due process rights of the parties, it is crucial that it adopt well-defined filing and evidentiary requirements. Simply permitting a complainant to allege facts that, if true, are sufficient to constitute a violation of the Act, without defining and requiring the submission of "proper supporting evidence" in the complaint, would both violate a defendant's procedural rights and invite a flood of nuisance filings.

There are three things that the Commission should do to enable it to rule on Section 271 complaints within the 90-day deadline while preserving the due process rights of the BOCs. First, the Commission should establish meaningful evidentiary standards that a complainant must meet before the 90-day clock would begin to run. Second, the Commission should shift the burden of producing evidence (not the burden of proof) to the BOC, once a complainant has met the evidentiary standards for filing a complaint. Third, the Commission should establish expedited procedural rules, including Alternative Dispute Resolution ("ADR") procedures, to mediate, arbitrate, or decide complaints within 90 days.

3. The Commission Should Require A Section 271 Complaint To Meet Threshold Evidentiary Standards

It is particularly important in this type of expedited proceeding for the Commission to establish detailed requirements for the filing of a complaint. First, respondents cannot meaningfully answer claims until the nature of the allegations and their factual predicate is

fully known. Given the expedited process, normal methods of discovery cannot be expected to yield the requisite data on a timely basis.[86]

Second, without such a requirement, complainants can "game" the system. The complainant, of course, has a significant procedural advantage at the outset because there is no time limit established in the Act for preparation of the complaint. In contrast, the respondent has only a fraction of the 90-day period to evaluate claims, gather relevant information from its records, interview potential witnesses, obtain data from the complainant and prepare its case, including addressing the legal issues raised by the complaint. If the complainant can withhold relevant information, the respondent will be placed at a severe, if not insuperable, procedural disadvantage.

Third, a competitor has a financial incentive to allege violations of Section 271(d)(3) of the Act, since one of the remedies that the FCC can impose for violations of this subsection is suspension or revocation of the competitor BOC's authorization to provide interLATA service. In the face of the potential benefits to a complainant, the possibility of sanctions for frivolous complaints alluded to in the rulemaking may be insufficient to deter unsubstantiated claims, particularly if the burden of proof is placed on the respondent as proposed by the Commission. Further, sanctions are seldom applied in litigation, in part because of the difficulty of proving that the conduct at issue is so egregious that sanctions

[86] NYNEX will address the specifics of the process, including discovery issues, in further detail in comments it intends to file in the separate proceeding addressing the expedited complaint procedures, which the FCC has said it expects to initiate (NPRM n.171).

are warranted. For this reason, adoption of a clear filing standard as described above is congruent with, and, indeed, essential to forestalling (and sanctioning) frivolous filings.

Finally, permitting a complaint to go forward based on allegations unsupported by the information reasonably available to complainants is fundamentally unfair, particularly in this context, where the BOC has previously demonstrated its compliance with the numerous and detailed requirements of Section 271(d)(3). In the face of the Commission's prior findings that the BOC has met its burden of demonstrating that its participation in the long distance markets would not impede robust competition, the FCC should not lightly assume that a BOC has disregarded the Commission's order absent a fully supported complaint to the contrary.

For these reasons, NYNEX proposes that, to make out a prima facie case, the complaint must:

- contain a description of the complainant and its interest;
- be sworn and notarized and enumerate the facts on which the complaint is based, differentiating between statements of personal knowledge and statements based on information and belief;
- provide a verifiable source of statements based on information and belief;
- contain a clear and concise recitation of the changes that have occurred since the authorization was granted which demonstrate a failure to comply with a specific condition of interLATA service;
- be accompanied by any documentation supporting the facts alleged which is available, or can reasonably be obtained; and
- identify any materials which the complainant has been unable to obtain after due inquiry which it asserts is in the BOC's possession.

If the complaint is deficient in any of the respects listed above, the FCC should notify the complainant that it is incomplete[87] and that the complaint will therefore not trigger the 90-day window within which the Commission must act.[88]

The requirement that a complainant meet certain threshold standards to establish a prima facie case is consistent with the procedural requirements of other agencies,[89] and it is analogous to the standard of due diligence employed by the federal courts under the Federal Rules of Civil Procedure. Rule 11(b) requires the attorney of record (or the pro se plaintiff) to perform a reasonable inquiry of the facts and law underlying a claim and to stipulate that "allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further

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87 Reviewing a complaint for completeness is consistent with the FCC's February 9, 1996 Public Notice in which the FCC stated its intention to discourage the filing of frivolous pleadings generally.

88 This is consistent with the manner in which other agencies review complaints. See, e.g. 11 C.F.R. § 111.5 (construing the enforcement clause of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §437g(a)(1) to require that the Federal Election Commission review a complaint "for substantial compliance with the technical requirements" of the agency's regulations before notifying the person named in the complaint within the five day statutory period); 32 C.F.R. § 1906.103 (construing the Rehabilitation Act of 1973, 29 U.S.C. §§ 700 et seq., and 29 C.F.R. § 1613.220 to require that a complainant be notified of the agency's determination within 180 days only if the complaint meets the criteria of a "complete" complaint). See, also, 18 C.F.R. § 375.308(d)(2) delegating to the Director of Office of Electric Power Regulation of the Federal Energy Regulatory Commission the authority to issue "deficiency letters" concerning incomplete applications and directing applicant to submit additional information. The period for agency action starts anew when the additional information is submitted.

89 18 C.F.R. § 365.3 (setting forth filing requirements for person seeking exempt wholesale generator status under Public Utility Holding Company Act of 1935, as amended by Energy Policy Act of 1992, 15 U.S.C. § 79z-5a).

investigation or discovery."[90] The purpose of such a rule is also consistent with the goals expressed in the FCC's February 9, 1996 Public Notice: to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses."[91]

4. Once A Complainant Has Satisfied The Evidentiary Standard For A Section 271 Complaint, The Burden Of Producing Evidence (Not The Burden Of Proof) Should Shift To The BOC

The Commission expresses its concern that it may not be able to act on a complaint within the 90-day deadline because "the BOC is likely to be in sole possession of information relevant to the complainant's case" (NPRM ¶ 10). However, this concern should be met by shifting the burden of producing evidence, not the burden of proof. Shifting the ultimate burden of proof to the respondent is neither necessary to accomplish the pro-competitive goals of the Act, nor consistent with established principles of due process. It is notable that the Act itself, while directing the FCC to "act" within 90 days, does not propose any such shift. Moreover, other agencies required to act within tight statutory deadlines adopt procedural measures to meet those deadlines -- without shifting the burden of proof.[92]

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90 See, Business Guides, Inc. v. Chromatic Communications Enterprises, Inc., 498 U.S. 533 (1991); Bensalem Township v. International Surplus Lines Ins. Co., 38 F.3d 1303 (3rd Cir. 1994); Triad Associates, Inc. v. Chicago Housing Authority, 892 F.2d 583 (7th Cir. 1989); Jackson v. Law Firm of O'Hara, Rubera, Osborne & Taylor, 875 F.2d 1224 (6th Cir. 1989).

91 See, Advisory Committee Notes to 1983 Amendments to Rule 11(b).

92 See e.g., 40 C.F.R. § 164.121 (general rules of practice for expedited hearings by Environmental Protection Agency under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d(a)(2), requiring a hearing to commence within five days of the receipt of a request for such hearing unless the registrant and Administrator agree that it shall start at a later

A survey of the procedural regulations of some 25 Federal agencies[93] indicates that the burden of proof in the overwhelming number of cases is placed on the complainant or applicant seeking a change in the status quo.[94] In the few cases where the burden of proof was placed on the defendant, such actions involved demonstrably different issues of strong public policy involving military and political concerns,[95] public safety,[96] or revenue

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time); 18 C.F.R. § 365.3 (setting forth filing requirements for person seeking exempt wholesale generator status under Public Utility Holding Company Act of 1935, as amended by Energy Policy At of 1992, 15 U.S.C. § 79z-5a requiring Federal Energy Regulatory Commission to issue a determination on the application within 60 days of receipt of application).

93 Those agencies are: Bureau of Alcohol, Tobacco and Firearms; Bureau of Land Management, Commodity Futures Trading Commission, Consumer Product Safety Commission, Customs Service, Department of Agriculture, Department of Commerce, Department of Housing and Urban Development, Department of Transportation, Drug Enforcement Administration, Environmental Protection Agency, Federal Aviation Administration, Federal Labor Relations Authority, Federal Reserve System, Federal Trade Commission, Food and Drug Administration, General Accounting Office, Immigration and Naturalization Service, Internal Revenue Service, International Trade Commission, Mine Safety and Health Administration, Nuclear Regulatory Commission, Office of Government Ethics, Office of Personnel Management, and Office of Surface Mining Reclamation and Enforcement.

94 See e.g., proceedings before: the General Accounting Office Personnel Appeals Board, 4 C.F.R. § 28.61 (1996); Office of Personnel Management, 5 C.F.R. § 185.132, § 294.109(f), § 297.301, § 1201.56 (1996); Department of Agriculture, 7 C.F.R. § 1.329 (1996); Federal Labor Relations Authority, 5 C.F.R. § 2423.18 (1996); Immigration and Naturalization Service, 8 C.F.R. § 208.3 (1996); Nuclear Regulatory Commission, 10 C.F.R. § 2.732 (1996); Federal Aviation Administration, 14 C.F.R. § 13.59 (1996); Federal Trade Commission, 16 C.F.R. § 3.43 (1996); Consumer Product Safety Commission, 16 C.F.R. § 1025.43 (1996); United States Customs Service Regulations, 19 C.F.R. § 133.43 (1996); United States International Trade Commission, 19 C.F.R. § 210.37 (1996).

95 See, e.g. failure to register under the Selective Service law, 5 C.F.R. § 300.706 (1996); application for political asylum under U.S. immigration law, 8 C.F.R. § 208.13 (1996).

96 See, e.g. Department of Agriculture tobacco recordkeeping requirements, 7 C.F.R. § 723.506 (1996); Bureau of Alcohol, Tobacco and Firearms proceedings involving the importation of dangerous weapons, 27 C.F.R. § 179.111 (1996); Food and Drug Administration safety review of a food or drug for public consumption, 21 C.F.R. § 12.87 (1996).

collection.[97] In such instances, governmental bodies assert a presumption of administrative regularity which can only be overcome by clear evidence to the contrary.[98] Moreover, there is a presumption that a public official will perform his or her duty properly.[99] There is not, however, and should not be, a presumption of administrative regularity when a private litigant, which is a competitor of the respondent, is involved.

Shifting the burden of proof to the BOC when the complainant alleges a failure to meet a statutory requirement also requires the defendant to prove a negative proposition (i.e., that it has not violated any of the conditions for interLATA service). Federal courts generally disfavor the requirement that a party be required to prove a negative proposition .[100] In the minority of cases in which courts have suggested that a party must prove a negative proposition, the burden was either imposed on the complainant and not the defendant,[101] mitigated by reducing the burden of proof,[102] or the decision was the result of

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97 See, e.g. Internal Revenue Service review of expense account information, 26 C.F.R. §1.162-17 (1996).

98 See, e.g. United States v. Chemical Foundation, Inc., 272 U.S. 1, 14-15 (1926); United States v. Ahrens, 530 F.2d 781, 785 (8th Cir. 1976).

99 See Fed. R. Evid. 803(8), Notes of the Advisory Committee.

100 See, e.g. Mitchell v. Volkswagenwerk AG, 669 F.2d 1199, 1204-05 (8th Cir. 1982) (holding that it is often impossible to prove a negative fact, and that the requirement to attempt to so prove converts "the common law rules governing principles of legal causation into a morass of confusion and uncertainty," thereby failing to serve the public interest); Ethyl Corp. v. EPA, 51 F.3d 1053, 1064 (D.C. Cir. 1995); Palombo v. Dept. of Labor, 937 F.2d 70, 73 (2d Cir. 1990); Griffin v. Red Run Lodge, Inc., 610 F.2d 1198, 1202 (4th Cir. 1979); Davis v. Califano, 603 F.2d 618 (7th Cir. 1979)

101 See, e.g., Aetna et al. v. General Electric Co., 758 F.2d 319, 325 (8th Cir. 1985) (imposing the burden on a complainant alleging a faulty product).

public policy considerations[103] not applicable to fostering competition in the telecommunications market.

NYNEX submits that the process described in answer to NPRM ¶¶ 99-100 above assures that relevant information will be disclosed early in the process, making it unnecessary for the Commission to take the extraordinary action of shifting the burden of proof.

If a complainant has submitted prima facie evidence of a violation, the BOC should be required to provide a sworn and notarized response, which should contain:

- an admission or denial of all allegations contained in the complaint;
- a summary of the facts on which the BOC response is based, differentiating between statements of personal knowledge and statements based on information and belief;
- a verifiable source of statements based on information and belief;
- any defense alleged to justify the conduct complained of; and
- documentation supporting the facts asserted in defense if such documents are available or can be reasonably acquired by the BOC within the time allowed for its response.

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[102] See, e.g., Weir v. Commissioner, 283 F.2d 675, 680 (6th Cir. 1960) (holding that the law imposes less of a burden on a taxpayer who is called upon to prove a negative than on a taxpayer attempting to sustain a deduction).

[103] Once a federal agency has shown by a preponderance of the evidence that removal of an employee is justified because the offence is job-related and the conduct is of a character likely to undermine public confidence in the agency, the employee is faced with the "extraordinary burden" of proving the negative proposition that his retention would not adversely affect the efficiency of the agency. See, e.g. Allerd v. Dept. of Health and Human Services, 786 F.2d 1128 (Fed. Cir. 1986).

This information should provide the Commission with the means of deciding the issues raised in the complaint within the statutory time period.

5. Procedures for Imposing Penalties Under Title V

The Commission proposes not to conduct trial-type hearings in deciding whether to impose penalties, including forfeitures, under Title V of the Act, for a BOC's failure to continue to meet the conditions of the approval of its in-region interLATA application (NPRM ¶ 106).

While the Commission reasonably concludes that a BOC's written response to a complaint would generally provide sufficient hearing rights for the Commission to impose non-forfeiture sanctions, a more extensive opportunity to be heard should apply to forfeitures. The 90-day deadline recognizes the need for the Commission to act quickly in requiring compliance with conditions on an in-region interLATA application that may be necessary for competitors to stay in business. The Commission would want to act quickly in such circumstances to order the BOC to "correct the deficiency" under Section 271(d)(6)(A)(i). However, imposition of forfeitures is a matter of deterrence, and it is not a matter that is time sensitive.

In addition, Section 503(b)(4) provides that the Commission must issue a notice of apparent liability before assessing forfeitures in non-trial type proceedings. Section 271(d)(6)(B) requires the Commission to "act" on a complaint within 90 days, but it does